

ENTERED

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DEC 20 2007

IN THE UNITED STATES BANKRUPTCY COURT

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K.R.W.

FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina

IN RE:

Robin Grace Randal,

Debtor(s).

C/A No. 07-03208-JW

Chapter 13

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, the Motion to Expedite Attorney Fee Payment is denied.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 20, 2007

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C/A No. 07-03208-JW

Chapter 13

ORDER

This matter comes before the Court upon Motion of John R. Cantrell ("Cantrell") to Expedite Attorney Fee Payment ("Motion"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Pursuant to Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. Cantrell is an attorney admitted to practice before this Court.
2. Debtor filed this chapter 13 case *pro se* on June 15, 2007.
3. Following the petition date, Cantrell agreed to represent Debtor in this matter for a fee of \$3,000.00 and he accepted a retainer payment of \$100.00 on July 20, 2007.
4. On September 30, 2007, Cantrell filed an amended chapter 13 plan ("Plan") for Debtor. The Plan is modeled after the form chapter 13 plan utilized in this District. It proposes the following distribution to Cantrell:

Subject to review and objection, a proof of claim for the attorney's fees of the debtor(s) in the amount of \$2,900.00 will be filed, and may be amended from time to time and shall be paid pursuant to this plan. Following confirmation of the plan and unless the Court orders otherwise, the chapter 13 trustee shall disburse \$500.00 for the attorney's proof of claim in the initial disbursement made by the chapter 13 trustee. In addition to the initial disbursement by the chapter 13 trustee, the balance of the attorney's proof of claim shall be paid with all funds remaining

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

each month after payment to secured and domestic support creditors as set forth herein.

In instances where an attorney assumes representation in pending pro se cases and a plan is confirmed, a separate order may be entered by the Court, without further notice, which allows for the payment of a portion of the attorney's fees in advance of payments to other creditors.

5. In addition to paying Cantrell's administrative expense claim, the Plan proposes payment to American General on two secured debts, one of which is secured by Debtor's vehicle and the other secured by an air conditioning unit, and payment to Atlan Homes, LLC² for debt secured by Debtor's residence.

6. On October 6, 2007, Cantrell filed the Motion to expedite payment of his attorneys' fees. The Motion requests that the Court allow payment of all of Cantrell's attorney's fees prior to payment to other creditors.

7. The chapter 13 trustee filed a return to the Motion and opposes the payment of any fees in excess of \$1,000.00 before other creditors begin receiving payments on grounds that the payment requested by Cantrell would delay payment to secured creditors for nine months and deny the creditors adequate protection payments.

8. On October 19, 2007, the trustee and Cantrell entered into a consent order allowing an initial disbursement to Cantrell of \$1,000.00 upon confirmation of the Plan.

9. On October 26, 2007, Debtor's Plan was confirmed by order of the Court.

10. Cantrell argued at the hearing on the Motion that a deviation from the standard distribution is warranted based upon his late assumption of representation and the amount of work required in this case. Debtor also appeared at the hearing and supported Cantrell's Motion

² As of the date of confirmation, Atlan Homes, LLC had not filed a proof of claim and therefore is not receiving the distribution provided for it in the Plan.

based upon the results he has obtained to date and his willingness to accept her case after other attorneys declined to represent her.

CONCLUSIONS OF LAW

In April of 2007, the Court revised the language of the form plan, in the applicable paragraph of Exhibit A to SC LBR 3015-1, with the goal being to improve the chances of a successful reorganization for debtors who might otherwise proceed *pro se*, which in turn improves the chances of payment to creditors as a result of a confirmed plan. Cantrell's participation in this case has met this objective and has benefited Debtor by achieving confirmation of a plan. In recognition of these efforts and with the trustee's agreement, the Court has approved a \$1,000.00 payment to Cantrell in advance of payment to all other creditors.

The issue that remains before the Court is whether all of Cantrell's remaining attorney fees should be paid in advance of any payment to other creditors. Balancing Debtor's desire to compensate her attorney as quickly as possible with her exposure to a stay relief motion or other actions if secured creditors are not adequately protected, as proposed by the Plan, and considering the mandatory priority scheme of 11 U.S.C. § 1326(b), the Court shall deny the Motion.

I. Adequate Protection

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended 11 U.S.C. § 1326(a) to provide that, unless the Court orders otherwise, a debtor should commence making adequate protection payments directly to a creditor secured by personal property, such as American General in this case, within 30 days of the petition date. The Court adopted SC LBR 3015-1(i)(2) to provide that such payments required by 11 U.S.C. § 1326(a)(3) should be made to the trustee and distributed at confirmation. The combination of this rule and the form chapter

13 plan provides an effective way to provide creditors with the required adequate protection through a quick distribution after confirmation and alleviates the need for more immediate adequate protection payments to be made directly by a debtor and the potentially complicated post-petition accounting of such payments by the debtor to the chapter 13 trustee. Considering the speed at which most chapter 13 plans are confirmed and distributions made in this District, creditors are generally protected from depreciation of their collateral.

In this case, Debtor proposes to pay monthly payments to American General, as adequate protection and to satisfy its liens, on two claims that are secured by depreciating assets, one of which is a vehicle with more than 176,000 miles according to the Plan.³ Under the terms of the Plan, it would take nearly four years to pay these claims, assuming distribution began upon confirmation of the Plan. Considering the collateral at issue, the Court finds that the Plan's distribution is the minimum amount necessary to provide American General with adequate protection. Delaying any distribution to American General for nine months, which is the apparent result of the Motion, on its depreciating collateral exposes Debtor to a stay relief motion or other creditor action. In the event there is a failure of adequate protection for the secured creditor, an administrative priority claim may be asserted. When there are competing administrative expense claims, such as adequate protection and attorney's fees, 11 U.S.C. § 507(b) sorts out the priority by providing super-priority to those creditors entitled to adequate protection payments. See DeSardi, 340 B.R. 790, 801 (Bankr. S.D. Tex. 2006). Though American General has not filed an objection to the Motion,⁴ the likelihood that such a significant

³ Although the claim secured by the vehicle is being valued, American General is still entitled to adequate protection payments on the secured portion of its claim.

⁴ The valuation of American General's total claim is small and may negate against the hiring of counsel to assert its right to priority in payment.

delay in plan payments could trigger the super-priority provision of 11 U.S.C. § 507(b) cautions against granting the Motion.

II. Discretion As to the Distribution of Attorney's Fees

Notwithstanding the issue of American General's priority, the Court would not grant the Motion because of the express language in the Plan and because the present distribution to Cantrell addresses the policy considerations on which Operating Order 07-06 was based. See In re Pappas & Rose, P.C., 229 B.R. 815 (W.D. Okla. 1998) (discussing the discretion of the bankruptcy judge to delay payment to attorneys of chapter 13 debtors); Operating Order 07-06 (stating that the Court adopts a revised form chapter 13 plan to promote access to justice and to increase the likelihood that attorneys will be fairly compensated). The Plan expressly provides that a "portion" of such a debtor's attorney's claim may be paid ahead of certain other creditors. The Motion seems to conflict with this provision of the confirmed Plan in that it seeks to have all of Cantrell's fees paid ahead of other creditors. Moreover, under the Plan in this case, Cantrell will receive an average of \$230.00 per month of the \$300.00 monthly payment available after the deduction of the trustee's commission, allowing approximately \$60.00 to \$70.00 per month for payment to secured creditors. Under the present Plan, Cantrell is receiving nearly 75% of the current available monthly payment. Allowing the full payment of Cantrell's claim in advance of other creditors would only slightly improve the timing of his payment while delaying distribution to creditors and exposing Debtor to creditor actions. Considering these factors and balancing the interests of Debtor, creditors, and Cantrell, the Court finds that the present plan payment is adequate to fairly compensate Cantrell for his services in this matter.⁵

Based upon the foregoing, the trustee's objection is sustained and the Motion is denied.

⁵ To the extent that there are additional or amended claims filed by Cantrell, the trustee shall bring these to the attention of the Court so that the Court may consider the equities how any additional claim should be paid.

AND IT IS SO ORDERED.

Columbia, South Carolina,
December 20, 2007


UNITED STATES BANKRUPTCY JUDGE